

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

SAUER, INC.

11223 Phillips Parkway Dr., E
Jacksonville, FL 32256

Plaintiff,

v.

**NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION**

NASA Kennedy Space Center,
FOIA Requester Service Center,
Kennedy Space Center, FL 32899

Defendant.

PLAINTIFF'S COMPLAINT

1. This is an action brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiff seeks the expedited processing and disclosure of all records and other documents, or parts of them, contained in Defendant, National Aeronautics and Space Administration's (hereinafter, "NASA") files concerning the Replacement of High Pressure Nitrogen and Helium Pipelines at the LC-39 area of the Kennedy Space Center, Project No. CCR-03-38 (hereinafter, the "Project") and NASA's involvement in the design, development, construction, and administration of said Project.

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C.A. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). Venue lies in this district under 5 U.S.C.A. § 552(a)(4)(B).

Parties

3. Plaintiff Sauer, Inc. (hereinafter, "Sauer") is a corporation established under the laws of the Commonwealth of Pennsylvania, with offices in Brevard County, Florida. Sauer is a mechanical contractor, licensed to perform construction work in the State of Florida. Sauer contracted with Space Gateway Systems, LLC (hereinafter "SGS") to perform construction work at the Kennedy Space Center (hereinafter "KSC") for the benefit of NASA.

4. Defendant NASA is an administrative agency of the Executive Branch of the United States Government within the meaning of 5 U.S.C. S 552(f). Defendant maintains regional offices at KSC, in Brevard County, Florida, and is conducting business within the Middle District of Florida judicial district.

Facts

5. On or about June 24, 2010, Sauer, by its attorneys, and pursuant to 5 U.S.C.A. §552, requested by letter that NASA produce copies of all records and other documents related to the Project contained in NASA's files for inspection and copying by Sauer. A copy of this request is attached as Exhibit "A", and incorporated by reference.

6. By letter dated July 8, 2010, defendant NASA, by its agent, the FOIA Public Liaison Officer, acknowledged receipt of the FOIA request and indicated that the

request would be held in abeyance for thirty days pending Sauer's agreement to pay the processing fee for the FOIA request. NASA also acknowledged that it had twenty business days in which to determine whether or not to release the requested documents.

7. On or about July 29, 2010, Sauer, by its attorneys, confirmed its agreement to pay the estimated processing fee.

8. NASA failed to release the Project related records requested by Sauer, or to object to the release of any records, within the statutorily required 20 days.

9. On October 12, 2010, NASA first advised Sauer that it had delayed the release of the requested documents based upon NASA FOIA regulation 14 CFR 1206.610 (d). NASA asserted that it had the obligation to allow SGS the opportunity to object to the disclosure of any commercial information that was included within the documents responsive to the FOIA request.

10. As of October 12, 2010, NASA advised that it had already given SGS the opportunity to review any commercial information included in NASA's search of its records, and that SGS had provided a response as to whether and to what extent it objected to the disclosure of any commercial information.

11. As of October 12, 2010, NASA also advised that it estimated that the legal review of SGS's response would take a minimum of 10 business days.

12. On November 5, 2010, NASA advised that the legal review by NASA's KSC Chief Counsel's Office was estimated to be completed by November 12, 2010. Furthermore NASA acknowledged that SGS's objections related only to some of the

requested records. NASA also re-affirmed its intention to produce records in response to the FOIA request.

13. On December 16, 2010, NASA again noted that the release of the documents was being held up by a "legal review", and estimated that any responsive records would be provided by early January of 2011.

14. On January 28, 2011, NASA reiterated its apologies for delaying the release of the records, and acknowledged that the statutory deadline had been missed, but failed to turn over any records.

15. In February of 2011, NASA produced 92 pages of documents in response to the FOIA request, but has acknowledged that there are thousands of other responsive documents that have still not been produced.

16. On March 30, 2011, NASA informed Sauer that the Chief Counsel's Office was still reviewing the documents. Furthermore, NASA disclosed that approximately 2,000 additional pages of responsive records had been identified, and were given to SGS for their review before release to Sauer. NASA also stated that it would have the records available for release on April 14 or 15, 2011.

17. On April 15, 2011, NASA failed to produce any additional records.

18. On April 26, 2011, NASA indicated that the documents are still in the possession of SGS, and that NASA "hope[s] to have [SGS's input/objections] by the end of this week."

Count I- Violation of Freedom of Information Act

19. Plaintiff repeats and realleges paragraph 1-18 as if fully set forth herein.

20. 5 U.S.C.A. § 552(a)(6)(A)(i) required NASA to determine within 20 business days whether to comply with Sauer's FOIA request.

21. NASA failed to respond to the request within 20 business days.

22. NASA has also promulgated rules governing the FOIA process under 14 CFR §1206. Pursuant to 14 CFR §1206.610, NASA is required to provide a "submitter" with notice of a FOIA request for "commercial information" provided by the submitter to NASA.

23. "Commercial information" is defined by NASA as information that may be exempt under the provisions of 5 U.S.C.A. 552(b)(4), which provides an exemption for, "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

24. 14 CFR §1206.610(d) allows a submitter to object to the disclosure of commercial information within a reasonable period of time, "not to exceed 10 working days" from when the submitter has notice of the request from NASA. The submitter's response is required to include, "all bases, factual or legal, for withholding any of the information pursuant to Exemption 4." NASA regulations also provide that, "Submitters will not be provided additional opportunities to object to disclosure..."

25. Upon information and belief, based upon the information provided by the NASA FOIA Public Liaison Officer, SGS as the submitter failed to object to the release of any commercial information included within NASA's response to Sauer's FOIA request within 10 working days, and therefore, any subsequent objection is invalid.

26. Pursuant to 5 U.S.C.A. § 552(a)(6)(C)(i), Sauer is deemed to have exhausted its administrative remedy since NASA failed to comply with the applicable time limit provisions of the statute and its own agency rules.

27. Upon information and belief, all of the information sought by Sauer is within the provisions of the FOIA, 5 U.S.C.A. §552(a)(3), and is required to be disclosed by NASA.

28. Upon information and belief, none of the information sought by Sauer is within the exemption provided by 5 U.S.C.A. §552(b)(4), and the information is required to be disclosed by NASA.

29. Even if some of the information requested is within the exemption provided by 5 U.S.C.A §552(b)(4), SGS waived its right to object to the release of the records to Sauer by failing to object within the required time limits.

30. NASA's failures are a violation of the FOIA, and irreparably injure Sauer by depriving it of public information to which it is entitled access.

Count II- Violation of the Administrative Procedure Act

31. Plaintiff repeats the allegations in paragraphs 1 through 29 as if fully set forth herein.

32. NASA's failure and refusal to furnish the requested information constitutes agency action unlawfully withheld and unreasonably delayed in violation of the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. §§ 701-706. NASA's failure to furnish the requested information is arbitrary, capricious, an abuse of discretion, not in accordance with the law and without observance of procedure required by law, all in violation of the APA.

33. NASA's failures are a violation of the APA, and irreparably injure Sauer by depriving it of public information to which it is entitled access.

Relief Requested for Counts I and II

WHEREFORE, for all of the foregoing reasons, Sauer, Inc. requests that this Court:

A. Deem the information sought by Sauer to constitute public information within the meaning of the Freedom of Information Act, as amended, 5 U.S.C.A. §552(a), and order NASA to make available for inspection and copying the information requested by Sauer in its request dated June 24, 2010;

B. Enjoin NASA from withholding the requested information from Sauer;

C. Expedite the proceedings in this action as provided in 5 U.S.C.A. §552(a)(4)(B);

D. Examine *in camera* those records withheld under any exemption to determine whether NASA's withholding should be sustained;

E. Award Sauer its costs and reasonable attorney's fee in this action pursuant to 5 U.S.C.A. §552(a)(4)(E);

F. Issue a written finding, pursuant to 5 U.S.C.A. §552(a)(4)(F), that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding;

G. Maintain jurisdiction over this action until NASA is in compliance with FOIA, APA and every order of this Court; and

G. Grant Sauer such other and further relief as the court deems just and proper.

Dated: April 28, 2011

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Stuart H. Sakwa

June 29, 2010

VIA CERTIFIED MAIL RRR #7007 0220 0001 8672 1908

John F. Kennedy Space Center

Attn: XA-A1/FOIA Customer Service Center

Kennedy Space Center, FL 32899

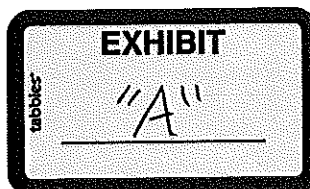
RE: *Freedom of Information Act Request*
Relating to the Replacement of High Pressure Nitrogen and Helium
Pipelines Located at the LC-39 Area at Kennedy Space Center;
Contract No. NAS10-99001, Project No. 03-38

Dear Sir/Madam:

This law firm represents Sauer Incorporated ("Sauer") in conjunction with its performance of the replacement of High Pressure Nitrogen and Helium Pipelines under a subcontract with Space Gateway Support, LLC ("SGS") related to SGS's Contract No. NAS10-99001 with the National Aeronautics and Space Administration ("NASA"), Project No. 03-38 (the "Project").

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, and NASA Regulations (14 C.F.R. § 1206, *et seq.*), we hereby request the opportunity to inspect and copy certain records, which are identified below and are in the possession, custody or control of NASA. Please provide a response to use to us within twenty (20) working days from receipt of this request. In the event that NASA decides not to release any particular document(s) or group of documents covered by this request, please identify the specific statutory and/or regulatory exemption(s) upon which you base your decision not to release such document(s). We reserve the right to appeal any decision that some or all of any document is exempt.

This FOIA request is for business/commercial reasons, and the fee category for this request is commercial. We will pay the reasonable search and duplication costs associated with this request and hereby authorize you to undertake the appropriate search on our behalf and bill our offices in accordance with the applicable regulations and procedures. If the costs likely will exceed \$250.00, please notify us before proceeding.



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In accordance with the above, we request the following records:

1. All agreements, contracts, correspondence, memoranda, meeting minutes, e-mails, or other documents related to Project No. CCR-03-38, which involved the replacement of High Pressure Nitrogen and Helium Pipelines.
2. All claims, request for equitable adjustment, change orders requests and/or proposed modifications submitted by SGS to NASA, as well as any and all documents relating to any discussions thereto, NASA's responses thereto and copies of any Contracting Officer's Final Decisions which relate to Project No. CCR-03-38, which involved the replacement of High Pressure Nitrogen and Helium Pipelines.
3. All correspondence, memoranda meeting minutes, e-mails and any other communications between SGS and NASA, or internally within NASA, related to the cleaning and hydrostatic testing of the High Pressure Nitrogen and Helium Pipelines on Project NO. CCR-03-38, including, but not limited to:
 - a. The methods used to satisfy the specified nonvolatile residue ("NVR") cleanliness standard;
 - b. The passivation of the piping;
 - c. NASA's determination that the pipelines in question were not "Ground Support Equipment;"
 - d. The cleaning procedures, cleanliness standards, and/or cleanliness performance requirements related to Project No. CCR-03-38, which involved the replacement of High Pressure Nitrogen and Helium Pipelines.
 - e. The justification for the determination that a visual cleanliness requirement should be included as an element of the cleaning procedures, cleanliness standards, and/or cleanliness performance requirements related to Project No. CCR-03-38, which involved the replacement of High Pressure Nitrogen and Helium Pipelines.
4. The entire project file, including all email correspondence, of government contracting officer Michael J. Wheeler for Project No. CCR-03-38.
5. The entire project file, including all email correspondence, of NASA Supplier Quality officer, Timothy R. Ross for Project No. CCR-03-38.
6. The entire project file, including all email correspondence, of NASA Propellants and Life Support officer Raymond M. Norman for Project No. CCR-03-38.

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7. The entire project file, including all email correspondence, of NASA Procurement Quality officer, James E. Smith for Project No. CCR-03-38.
8. The entire project file, including all email correspondence, of AST-Logistics Engineering Management officer Sasha M. Rodriguez for Project No. CCR-03-38.
9. The entire project file, including all email correspondence, of Fabiola I. Frank for Project No. CCR-03-38.
10. The entire project file, including all email correspondence, of Kenneth G. Madyda for Project No. CCR-03-38.
11. The entire project file, including all email correspondence, of Chien V. Nguyen for Project No. CCR-03-38.

Thank you in advance for your assistance in processing this request. Please contact me at (954) 525-6110, or s.sakwa@mooreandlee.com, if you have any questions.

Very truly yours,

MOORE & LEE, LLP



Stuart H. Sakwa

SHS/mag

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

John F. Kennedy Space Center
Attn: XA-A1/FOIA Customer Service
Center
Kennedy Space Center, FL 32899

2. Article Number

(if from service label)

7007 0220 0001 8672 1908

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-154

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X *Denny L. Myers*☐ Agent☒ Addressee

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C. Date of Delivery

7/01/10

- D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

- ☒ Certified Mail ☐ Express Mail
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☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes